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Supreme Court, U.S.
FILED

No. 98 1931 MAY 28 1999

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1999

ARTHUR CALDERON,

Petitioner,

v.

ANTHONY CORNELL BEAN,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEAL FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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38 pp

(CAPITAL CASE)

QUESTION PRESENTED

Does the Ninth Circuit opinion attempt to establish a higher standard than that announced in *Strickland* for reviewing the constitutional adequacy of counsel's performance in the penalty phase of a capital case? Has the Ninth Circuit substituted a requirement of flawless performance for the generally accepted standard of competent representation? Does the opinion overlook important facts relating to trial counsel's performance at the penalty phase and the fact that even if more could have been done, there was no prejudice in light of the record at trial? Secondly, in regard to the severance issue, does the opinion improperly disregard state court findings and determinations? Finally, this case presents an important question of federal law affecting the most basic aspects of federalism, with especially far-reaching impact on State death penalty judgments. By granting relief to a capitally convicted defendant whose state habeas was specifically rejected as untimely, has the District Court and the Ninth Circuit unconstitutionally violated the most sacred promise of federalism.

TABLE OF CONTENTS

	Page
OPINION OR JUDGMENT BELOW	1
STATEMENT OF JURISDICTION	2
CONSTITUTIONS, STATUTES OR REGULATIONS	2
STATEMENT OF THE CASE	3
a. State Proceedings	3
SUMMARY OF REASONS FOR GRANTING THE WRIT	7
ARGUMENT	9
I. THE NINTH CIRCUIT'S HOLDING THAT THE TRIAL COURT IMPROPERLY DENIED BEAN'S MOTION FOR SEVERANCE FAILS TO PROVIDE DUE DEFERENCE TO THE STATE COURT FINDINGS AND IS AN AFFRONT TO FEDERALISM	9
II. THE NINTH CIRCUIT'S OPINION ADOPTS A NEW CONSTITUTIONAL TEST WHICH, IN EFFECT, REQUIRES THAT TRIAL COUNSEL PERFORM "FLAWLESSLY" IN ORDER TO MEET SIXTH AMENDMENT STANDARDS IN A DEATH PENALTY CASE	15

TABLE OF CONTENTS, CONT'D

III. GRANTING HABEAS CORPUS RELIEF ON A CLAIM WHICH THE CALIFORNIA SUPREME COURT EXPRESSLY FOUND TO HAVE BEEN PROCEDURALLY BARRED AND UNTIMELY OFFENDS THE MOST BASIC PRINCIPLES OF COMITY AND FEDERALISM 21

A. California's Well Established And Consistently Applied Timeliness Requirements Were Applicable To Petitions For Writ Of Habeas Corpus In Capital Cases Filed Prior To 1994 24

B. It Is Clear Constitutional Error To Assume That California's Timeliness Procedural Requirements Were Not Independent And Adequate State Procedural Bars To Federal Review 25

CONCLUSION 30

TABLE OF AUTHORITIES

Page

Cases

Beam v. Paskett
3 F.3d 1301, 1306 (9th Cir. 1993) 27

Bean v. Calderon
163 F.3d 1073, 1086-1087 (9th Cir. 1998) 13, 15

Calderon v. Bean
520 U.S. 1204 (1997) 7

Calderon v. United States District Court for the Eastern District of California (Bean)
96 F.3d 1126 (9th Cir. 1996) 6

Clarbourne v. Lewis
64 F.3d 1373, 1383 (9th Cir. 1995) 18, 19

Coleman v. Thompson
501 U.S. 722, 731-732 (1991) 22

Correll v. Stewart
137 F.3d 1404 (9th Cir. 1998),
cert. denied __ U.S. __,
119 S.Ct. 450 (1998) 18

Fearance v. Scott
56 F.3d 633, 642 (5th Cir. 1995) 28

Featherstone v. Estelle
948 F.2d 1497, 1503 (9th Cir. 1991) 12

TABLE OF AUTHORITIES, CONT'D

Fields v. Calderon
125 F.3d 757 (9th Cir. 1997) 26

Ford v. Georgia
498 U.S. 411, 424 (1991) 23, 28

Harmon v. Ryan
959 F.2d 1457, 1461 (9th Cir. 1992) 23

Hendricks v. Calderon
70 F.3d 1032 (9th Cir. 1995) 18

Herring v. Meachum
11 F.3d 374, 377-378 (2d Cir. 1993) 9, 12, 13

Holins v. Department of Corrections State of Iowa
969 F.2d 606, 608 (8th Cir. 1992) 11

Holman v. Gilmore
126 F.3d 876 (7th Cir. 1997) 16

In re Clark
5 Cal.4th 750 (1995) 4, 6, 22, 24-29

In re Harris
5 Cal.4th 813, 826 (1993) 5, 6, 24

In re Stankewitz
40 Cal.3d 391 (1985) 6, 24, 27, 28

In re Walker
10 Cal.3d 764, 774 (1974) 24

TABLE OF AUTHORITIES, CONT'D

In re Waltreus
62 Cal.2d 218, 225 (1965) 5

Johnson v. Mississippi
486 U.S. 578, 587-589 (1988) 23

Karis v. Vasquez
828 F.Supp. 1449 (E.D.Cal. 1993) 25

McKenna v. McDaniel
65 F.3d 1483 (9th Cir. 1995) 26

Morales v. Calderon
85 F.3d 1387 (9th Cir. 1996) 26

Moran v. McDaniel
80 F.3d 1261, (9th Cir. 1996) 26

NAACP v. Alabama ex rel. Flowers
377 U.S. 288, 297 (1964) 23

Odle v. Calderon
884 F.Supp. 1404, 1415 (N.D. CA 1995) 14

Paradis v. Arave
954 F.2d 1483 (9th Cir. 1992) 25, 26

Pearson v. Norris
52 F.3d 740 (8th Cir. 1995) 28

People v. Bean
46 Cal.3d 919 (1988) 5, 9, 11, 13, 14, 16

TABLE OF AUTHORITIES, CONT'D

People v. Pope
23 Cal.3d 412, 426 (1979) 16

Pointer v. United States
151 U.S. 396, 403-404 (1894) 11

Prihoda v. McCaughtry
910 F.2d 1379, 1383 (7th Cir. 1990) 23

Siripongs v. Calderon
35 F.3d 1308 (9th Cir. 1994),
cert. denied, 115 S.Ct. 1175 (1995) 25

Smith v. Stewart
140 F.3d 1263 (9th Cir. 1998) 17, 18

Strickland v. Washington
466 U.S. 668, 686 (1984) 15, 16, 18, 20

Sumner v. Mata (Mata I)
449 U.S. 539, 551-552 (1981) 16

Tredway v. Farley
35 F.3d 288, 292-295 (7th Cir. 1994) 29

United States v. Bagley
473 U.S. 667, 682 (1985) 11

United States v. Johnson
820 F.2d 1065 (9th Cir. 1987) 12-14

United States v. Lane
474 U.S. 438, 446, n. 8 (1986) 11

TABLE OF AUTHORITIES, CONT'D

Constitutional Provisions

United States Constitution
Article VI, Clause 2 — 2

Statutes

Penal Code
§ 954 — 9, 10

Court Rules

CALJIC
No. 17.02 — 14

Other Authorities

28 U.S.C. section 636, subdivision (b)(1)(B) — 5
28 U.S.C. section 1254(1) — 2
28 U.S.C. section 2254 — 2

The Tenth Amendment of the
United States Constitution — 2

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1999

No.

ARTHUR CALDERON,

Petitioner,

v.

ANTHONY CORNELL BEAN,

Respondent.

J.S. Woodford, Acting Warden of California State Prison at San Quentin, ("the warden") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION OR JUDGMENT BELOW

The opinion of the United State Court of Appeals for the Ninth Circuit is reported as 163 F.3d 1073 (9th Cir. 1998), affirming in part; reversing in part the judgment of the district court. A copy of that decision is attached hereto as appendix A . The order of the Court of Appeals, Ninth Circuit, that denied petitioner's petition for rehearing and suggestion for rehearing and suggestion for rehearing en banc is unreported and is reproduced and attached as Appendix B.

STATEMENT OF JURISDICTION

The acting warden timely invokes the Court's jurisdiction pursuant to 28 U.S.C. section 1254(1). The judgment of the United States court of Appeal for the Ninth Circuit was entered on December 15, 1998. The petition for rehearing was denied on March 2, 1999.

CONSTITUTIONS, STATUTES OR REGULATIONS

Article VI, Clause 2, of the United States Constitution provides:

> This Constitution, and the law of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby; anything in the Constitution or law of any state to the contrary notwithstanding.

The Tenth Amendment of the United States Constitution provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Section 2254 of title 28, United States Code, provides in pertinent part:

> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

STATEMENT OF THE CASE

State Proceedings

On August 30, 1980, the Sacramento County District Attorney filed an information in the Superior Court accusing respondent Bean ("Bean") with the murder of Beth Schatz; assault with intent to commit murder; robbery; burglary; the murder of Eileen Fox; robbery; and burglary. The information further alleged that Bean used a deadly and dangerous weapon, and that Bean inflicted great bodily injury. Three special circumstances were alleged with respect to the murders, to wit: 1) that the murders were committed during the commission of a robbery; 2) that the murders were committed during the commission of a burglary; and 3) that both murders were of the first degree and that Bean stood convicted of multiple murder.

On June 8, 1981, the jury found Bean guilty of the first degree murder of Beth Schatz with the use of a dangerous and deadly weapon. With respect to this count, the jury also found true all three special circumstances. The jury also found Bean guilty of the first degree murder of Eileen Fox with a finding of three special circumstances. In addition, the jury found Bean guilty of two counts of robbery, one count of burglary in the first degree, one count of burglary in the second degree and one count of assault with a deadly weapon with great bodily injury.

On June 22, 1981, following the penalty phase of the trial, the jury found that the aggravating factors outweighed the mitigating factors and imposed the death penalty. CT 1021, 1023. The jury found that the mitigating factors outweighed the aggravating factors as to the Fox murder and accordingly imposed the penalty of

confinement in the state prison for life without the possibility of parole.

Bean was sentenced on July 20, 1981. For the murder of Beth Schatz, he received the death penalty. For the murder of Ellen Fox, he was sentenced to a term of life without the possibility of parole. This life term was ordered to be served consecutively to the seven year term he received for the other convictions, plus the enhancement.

Appeal to the California Supreme Court was automatic.

On September 19, 1988, the California Supreme Court affirmed Bean's convictions in all respects. The opinion affirming Bean's convictions and death penalty is published at 46 Cal.3d 919 (1988).

The petition for writ of certiorari which was filed on April 24, 1989, was denied on March 19, 1990.

On July 18, 1991, counsel appointed to represent Bean filed a federal petition for writ of habeas corpus.

On July 30, 1991, the State filed a motion for summary adjudication which alleged that the petition contained unexhausted claims.

On September 26, 1991, the District Court ordered that Bean exhaust all unexhausted claims and stayed his execution.

Three years after counsel was appointed by the California Supreme Court on October 31, 1991, Bean filed a petition for writ of habeas corpus.

On June 1, 1994, an informal response was filed.

Specifically citing *In re Clark*, 5 Cal.4th 750 (1995), the California Supreme Court on February 23, 1995, denied Bean's petition for writ of habeas corpus[1] and held that:

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1. Appendix C.

> The petition for writ of habeas corpus is denied on the ground that it is untimely, does not identify those claims regarding which [Bean] lacked knowledge or advise when he became aware of the factual basis for those claims, and does not adequately explain the delay in the investigating and presenting the claims.

The California Supreme Court *also* specifically addressed numerous issues as ". . . procedurally barred in that they were or could have been, but were not, raised on appeal or were waived by failure to preserve them at trial." *In re Harris*, 5 Cal.4th 813, 826 (1993); *In re Clark*, 5 Cal.4th 750, 765; *In re Waltreus*, 62 Cal.2d 218, 225 (1965). *See also*, *People v. Bean*, 46 Cal.3d 919 (1988).

Lastly, the California Supreme Court addressed several issues noting that they had ". . . been considered on their merits, *see In re Clark*, 5 Cal.4th 750, 797-798, but, in light of the record of the trial and related proceedings, failed to state a prima facie case entitling [Bean] to relief."

Bean filed an amended federal petition for writ of habeas corpus on or about March 22, 1995.

On July 21, 1995, the State filed a motion to dismiss Bean's amended petition urging that his contentions had been procedurally defaulted in state court as untimely. (Additionally, the State argued that specific claims were procedurally barred as articulated by the California Supreme Court above.)

On November 17, 1995, the magistrate judge, pursuant to a referral by the district court under 28 U.S.C. section 636, subdivision (b)(1)(B), filed Findings and Recommendations (hereinafter "F and R's"), wherein the magistrate judge denied the State's motion to dismiss 52 claims based on independent and adequate state procedural bars. A copy of these findings is attached hereto as Appendix D United States District Court

Findings and Recommendations and is incorporated by reference herein.

In his "F and R's," the magistrate judge refused to apply *Clark* or *Harris* to Bean's state habeas petition even though it was filed subsequent to both decisions, finding instead that neither case was the law at the time Bean should have raised his claims, "i.e., within a reasonable time after the final date of *Stankewitz*[2/] [January 16, 1986], *Clark* was not the law." F&R p. 8, fn. omitted.

On March 29, 1996, the district court, over the State's objections, filed an order adopting the magistrate judge's Findings in their entirety and denying the State's motion to dismiss. Appendix E.

From May 20, 1996, through May 30, 1996, the parties conducted an evidentiary hearing before Magistrate Judge Gregory G. Hollows.

On July 18, 1996, the State filed a petition for writ of mandate and/or prohibition in the Ninth Circuit Court of Appeals. In an opinion filed on September 30, 1996, the court of appeals denied the petition. *Calderon v. United States District Court for the Eastern District of California (Bean)*, 96 F.3d 1126 (9th Cir. 1996). On November 26, 1996, the State's petition for rehearing was denied.

On January 23, 1997, the magistrate judge filed findings and recommendations recommending that a writ of habeas corpus issue for purposes of the penalty phase. The magistrate judge concluded *inter alia* that: as to claim XLIX, penalty phase counsels' representation was constitutionally substandard, and that petitioner was prejudiced by counsels' alleged incompetence, and; (2) as to Claim XXI, there was bailiff misconduct which was

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2. *In re Stankewitz*, 40 Cal.3d 391 (1985).

potentially prejudicial to petitioner in the penalty phase of the trial.

On April 28, 1997, this Court denied the State's petition for certiorari contesting the district court's application of the procedural bar. *Calderon v. Bean*, 520 U.S. 1204 (1997).

On June 30, 1997, Chief Judge William B. Shubb adopted the magistrate judge's findings except for the finding that bailiff misconduct resulted in prejudice to Bean at the penalty phase. Accordingly, Bean's petition for writ of habeas corpus as to the guilt phase was denied; Bean's petition for writ of habeas corpus as to the penalty was granted and the sentence of death was vacated.

Petitioner filed a timely notice of appeal in the United State Court of Appeals for the Ninth Circuit on August 20, 1997. Bean filed a notice of cross-appeal on August 27, 1997.

On December 15, 1998, the United States Court of Appeals for the Ninth Circuit reversed the district court's decision as to Bean's conviction for the burglary, robbery, and murder of Eileen Fox. In all other respects, the court affirmed the district court's judgment.

Rehearing was denied on March 2, 1999.

SUMMARY OF REASONS FOR GRANTING THE WRIT

Petitioner respectfully submits that the opinion of the United States Court of Appeal for the Ninth Circuit, filed December 15, 1998, overlooked or misapprehended particular points of law and fact. The opinion held that 1) defense counsel's performance at the penalty phase constituted inadequate assistance of counsel, and, 2) the trial court improperly denied Bean's motion for severance of the two counts joined for trial. The opinion affirmed the District Court's order granting relief from the death sentence and, additionally, reversed one of

the two murder convictions on the basis that it was improperly joined to a stronger case.

Petitioner seeks certiorari because both holdings conflict with and misapply Ninth Circuit authority. The opinion overlooks important facts relating to trial counsel's performance at the penalty phase and the fact that even if more could have been done, there was no prejudice in light of the record at trial. Additionally, in regard to the severance issue, the opinion essentially ignores state court findings and determinations.

This case presents an important question of federal law affecting the most basic aspects of federalism, with especially far-reaching impact on State death penalty judgments.

ARGUMENT

I.

THE NINTH CIRCUIT'S HOLDING THAT THE TRIAL COURT IMPROPERLY DENIED BEAN'S MOTION FOR SEVERANCE FAILS TO PROVIDE DUE DEFERENCE TO THE STATE COURT FINDINGS AND IS AN AFFRONT TO FEDERALISM

Petitioner respectfully submits that, as correctly noted by the district court, Bean has not met his "onerous burden" of demonstrating that he was actually prejudiced by the joinder, so as to deprive him of a fair trial. *Herring v. Meachum*, 11 F.3d 374, 377-378 (2d Cir. 1993). The Ninth Circuit's finding that *Bean's* due process rights were violated is a clear error which only this Court can reverse.

The California Supreme Court concluded that the manner in which the Schatz and Fox homicides were committed were ". . . not sufficiently similar to reflect a common modus operandi." The court also concluded, however, ". . . it does not follow that denial of the [severance] motion was an abuse of discretion. Here, the State's interest in joinder was not outweighed by the potential of prejudice." *People v. Bean*, 46 Cal.3d 919, 935.

California Penal Code section 954 provides that a trial court may order severance in the trial of otherwise joinable offenses when it appears that separate trials are required in the interest of justice. This provision reflects an apparent legislative recognition that severance may be necessary in some cases to satisfy the overriding constitutional guarantee of due process.

The California Supreme Court concluded that the evidence of the Schatz and Fox homicides was not "cross-admissible" and discussed whether the trial court abused its discretion in denying the motion for severance.

The Court noted that the evidence in question entirely involved *charged offenses,* i.e., the Fox and Schatz homicides, rather than evidence of *uncharged offenses.* "The prosecution is entitled to join offenses under the circumstances specified in section 954. The burden is on the party seeking severance to clearly establish that there is a substantial danger of prejudice requiring that charges be separately tried." Citation deleted; *Id.* at 938.

The court concluded that Bean failed to demonstrate that the trial court's denial of severance was an abuse of discretion. The California Supreme Court concluded that:

> . . . neither offense was particularly inflammatory in comparison with the other. There was substantial evidence of defendant's involvement in each. His own admissions implicated him in the Schatz offenses, and his fingerprint on the sunglasses found near the body of Eileen Fox strongly implied his involvement in her murder. It did not appear reasonably likely, therefore, that the jury would be influenced in determining the defendant's guilt of either group of offenses by knowledge of the other.

Id. at 939.

The California Supreme Court also noted the significant benefits to the prosecution of joint trials, i.e., the conservation of judicial resources and public funds, requirement of only a single courtroom, judge, court attaches, one group of jurors, and the reduced delay on disposition of criminal charges both in trial and through the appellate process. "These considerations outweigh the minimal likelihood of prejudice through joinder of the charges in this case. Denial of severance, therefore, was not an abuse of discretion." *Id.* at 939-940.

Citing *Pointer v. United States,* 151 U.S. 396, 403-404 (1894), the California Supreme Court concluded its analysis by determining the "actual impact at trial of the joinder" and by rejecting any claim of spillover:

> . . . we find neither actual nor potential prejudice such as to render the trial grossly unfair and thus denying due process. Although at trial the reliability of the fingerprint evidence in the Fox murder was disputed, other evidence pointed to defendant as the perpetrator. His contradictory explanation of his ownership of those or similar sunglasses; his presence in the neighborhood when he was seen possibly 'casing' the home; his familiarity with the route to the Florin Meadows Apartment from the location at which the victim's car and wallet were abandoned, as well as fingerprint evidence was sufficiently persuasive evidence of his guilt that it is not reasonable probable that the jury was influenced in its verdict of guilt of the Fox crimes by its knowledge of his involvement in the Schatz offenses.

People v. Bean, 46 Cal.3d 919, 940, citing *United States v. Bagley,* 473 U.S. 667, 682 (1985).

Petitioner respectfully submits that it is well established that when severance is raised as an issue on federal habeas corpus, Bean's burden is extremely heavy and misjoinder must render the trial fundamentally unfair to amount to a constitutional violation. *Holins v. Department of Corrections, State of Iowa,* 969 F.2d 606, 608 (8th Cir. 1992). In this regard, *United States v. Lane*, 474 U.S. 438, 446, n. 8 (1986) recites that "[I]mproper joinder does not, in itself, violate the constitution. Rather, misjoinder . . . rise[s] to the level of a constitutional violation only if it results in prejudice so great as to deny

a defendant his . . . right to a fair trial." Thus, joinder is a problem only if it actually renders a state trial unfair in violation of due process. *Herring v. Meachum*, 11 F.3d 374. The Ninth Circuit in *Featherstone v. Estelle*, 948 F.2d 1497, 1503 (9th Cir. 1991) limiting instructions can adequately deal with the possible charges of carryover and a presumption of fidelity and legality attaches to state criminal proceedings. *Id.* at p. 378.

Neither the potential for prejudice nor even a high probability of prejudice will suffice in establishing whether consolidation violated due process; Bean must establish that prejudice actually resulted "from the events as they unfolded during the joint trial." *Herring v. Meachum*, 11 F.3d 374, 377, 378. The Second Circuit clearly articulated the procedural posture for habeas corpus review of this issue:

> [H]abeas petitioners challenging their state convictions under the general fairness mandate of the due process clause bear an onerous burden. Because of the significant procedural protection provided by direct review through the state system, we will not lightly conclude that state court proceedings were so arbitrary as to violate due process.

The Ninth Circuit has not directly addressed this issue in a habeas case. In *United States v. Johnson*, 820 F.2d 1065 (9th Cir. 1987) a direct review case, however, the Ninth Circuit noted in dictum that:

> Even if the evidence would not have been admissible, the district court did not abuse its discretion because the jury was not likely in this case to confuse which count particular evidence was introduced to establish. What evidence concerning the other crime is limited or not admissible, our primary concern is whether the

> jury can reasonably be expected to 'compartmentalize the evidence' so that evidence of one crime does not taint the jury's consideration of the other crime.

Id. 1071.

The court elaborated further, "[E]ven where evidence of one of the crimes is particularly weak, . . . we consider [] whether the jury was likely to have been confused." *Id.* 1071 n. 6, citations omitted. The fundamental constitutional issue is therefore, whether the jury was reasonably able to distinguish evidence introduced in one case from evidence introduced in the other.

The California Supreme Court determined that the evidence against Bean was sufficient on both counts and that "no spillover effect of the evidence occurred." *People v. Bean*, 46 Cal.3d 919, 940. The evidence introduced for both the Fox offense and the Schatz offense was simple and distinct, making it likely that the jury was able to keep the evidence separate when considering the various counts against Bean. *See Herring v. Meachum*, 11 F.3d 374, 378 ("moreover, because the evidence with respect to each murder was distinct and easily compartmentalized, the risk of jury confusion at petitioner's trial was significantly limited").

Significantly, the Ninth Circuit found that the evidence adduced at Bean's original trial ". . . was sufficient for a rational fact finder to find Bean guilty beyond a reasonable doubt. . ." of the Fox offenses. *Bean v. Calderon*, 163 F.3d 1073, 1086-1087 (9th Cir. 1998).

The evidence used to prove such distinctly distinguishable crimes is unlikely to have confused the jury. The Ninth Circuit is apparently concerned that the jury would have been confused as to which crime the instructions regarding aiding and abetting and conspiracy

applied. Petitioner respectfully disagrees. Without question, a jury would be able to realize that instructions regarding aiding and abetting or conspiracy apply to the offense involving multiple assailants and not to the crime involving a single assailant. The Ninth Circuit also suggests that acquittal as to one of the counts would have established that the jury had compartmentalized the evidence. The Ninth Circuit has in fact determined that there is sufficient evidence to convict the accused on both counts. The jury in fact brought separate verdicts for the two murders and determined that Bean should be sentenced to death for the Schatz's murder and be in prison for life for the Fox murder.

Citing *United States v. Johnson*, 820 F.2d 1065, 1071, the Ninth Circuit opines that a jury can only compartmentalize the evidence if properly instructed to do so by the court. In *Johnson* the jury instruction found to be sufficient was "[E]ach count charges a separate crime. You must decide separately what the evidence in the case shows about the crime." *Id.* 1071. In the instant case, the trial court specifically charged the jury to separately consider each count. ". . . each count charges a distinct offense. You must decide each count separately. The defendant may be found guilty or not guilty of any or all the crimes charged. Your finding on each count must be stated in a separate verdict." CALJIC No. 17.02, CT 883, RT 3818; *see Odle v. Calderon*, 884 F.Supp. 1404, 1415 (N.D. CA 1995).

Lastly, as noted by the district court, "the California Supreme Court, in addressing the joinder issue, found 'neither actual nor potential prejudice,' a more stringent standard than that required by the Fourteenth Amendment." *Citing, People* v. *Bean*, 46 Cal.3d 919, 940.

II.

THE NINTH CIRCUIT'S OPINION ADOPTS A NEW CONSTITUTIONAL TEST WHICH, IN EFFECT, REQUIRES THAT TRIAL COUNSEL PERFORM "FLAWLESSLY" IN ORDER TO MEET SIXTH AMENDMENT STANDARDS IN A DEATH PENALTY CASE

Petitioner acknowledges that Bean's representation at the penalty phase was not "flawless." However, it is also clear that counsel's performance did not "so [undermine] the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686 (1984).

This Court has set a standard which has been characterized as "low" for counsel to qualify as effective because "the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation . . . [but] is simply to ensure that criminal defendants receive a fair trial." *Strickland v. Washington*, 466 U.S. 668, 689.

The opinion of the United States Court of Appeals for the Ninth Circuit ("Ninth Circuit") concurred with the findings of the district court and a magistrate judge and determined that the representation Bean received at the penalty phase was constitutionally inadequate. The Ninth Circuit found that "Bean's penalty-phase defense was disorganized and cursory. . . . The two attorneys' confusion over they respective roles exacerbated deficiencies in the development of mitigating evidence." *Bean v. Calderon*, 163 F.3d 1073, 1078.

Petitioner respectfully submits that the Ninth Circuit has in fact employed a new test for reviewing the constitutional competency of counsel which now requires a showing that the attorney performed flawlessly, especially during the penalty phase of a capital case. The

California Supreme Court unanimously referenced the same strategic and tactical decisions made by trial counsel which were at issue in the federal proceedings and was ultimately satisfied that trial counsels' performance met the constitutional standard as set forth in *People v. Pope,* 23 Cal.3d 412, 426 (1979), *People v. Bean*, 46 Cal.3d 919, 944 (1988). *See Strickland v. Washington*, 466 U.S. 668.

It is a well established principle of collateral review that when a state court applies established constitutional law, its decision must be respected and presumed correct. *Sumner v. Mata (Mata I),* 449 U.S. 539, 551-552 (1981); *Strickland v. Washington*, 466 U.S. 668 calls for an inquiry into degree: ". . . it is a balancing rather than a bright-line approach, just like the question about confrontation rights. . . This means that only a clear error in applying *Strickland* standard would support a writ of habeas corpus." *Holman v. Gilmore*, 126 F.3d 876 (7th Cir. 1997). (Citations deleted.)

Petitioner respectfully submits that in the instant case, the Ninth Circuit's opinion fails to afford the California Supreme Court's decision due deference, i.e., the majority opinion appears to be little more than a de novo concerning the way trial counsel presumably should have handled the defense. The opinion fails to address the question posed by *Strickland* ". . . whether taking all of the proceedings into account, counsel made 'the adversarial testing process' work in the particular case." *Holman v. Gilmore*, 126 F.3d 876, 882, citing *Strickland v. Washington*, 466 U.S. at 690.

At the penalty phase, Bean's counsel presented nine witnesses, taking up more than 200 pages of witness testimony. These witnesses included two psychiatric experts, Dr. Weissman and Dr. Blunt, who also testified at the 1996 evidentiary hearing. At trial, Dr. Blunt testified that, after performing five neurological tests, she was convinced that Bean was organically brain damaged from three lesions on the brain. This brain damage, Blunt

testified, involved an inability to think, to form judgments, to plan or to appreciate the criminality of conduct. Dr. Weissman testified that he had used six different tests on Bean and discovered that Bean was suffering from organic personality disorder and mental retardation (Bean had the mental age of an 8 to 11 year old in terms of "thinking" and "capacity to understand his environment"). Dr. Weissman testified that although he had reached no firm conclusion, he determined that Bean had "soft signs" of "potentially mild to moderate degree of organic . . . brain damage." Contrary to the Ninth Circuit's conclusion, counsel's presentation of the two psychiatric witnesses did not constitute a "failure to elicit mitigating testimony from mental health experts."

Petitioner does not dispute the fact that in 1981 Bean's trial counsel *could* have presented Bean's mitigating evidence in greater and more compelling detail, i.e., as adduced years later at the 1996 evidentiary hearing.

Petitioner respectfully submits that the Ninth Circuit's opinion fails to focus on whether Bean's penalty phase counsel was constitutionally competent, a much lower standard than the seamless presentation the Ninth Circuit now suggests should have been made.

The instant case is in marked contrast from other recent cases in which the Ninth Circuit has held that counsel was constitutionally deficient during the penalty phase. In *Smith v. Stewart*, 140 F.3d 1263 (9th Cir. 1998) cert. den. __ U.S. __ 119 S.Ct. 336 1998, the Ninth Circuit held that trial counsel provided ineffective assistance because counsel "provided no evidence at the penalty phase and virtually no argument" despite the fact that evidence of mitigating circumstances "was rather near the surface." *Id.* at 1269. Counsel's only argument involved "a few asthenic comments to the effect that Smith still denied his guilt and that he was just 30 years of age. Nothing else!" *Id.* at 1263.

In *Correll v. Stewart*, 137 F.3d 1404 (9th Cir. 1998), cert. denied __ U.S. __, 119 S.Ct. 450 (1998), counsel failed to present any evidence of petitioner's purported mental illness as a mitigating factor. Defense counsel's argument at the sentencing hearing took a total of eight transcript pages. The Ninth Circuit held that "[T]his almost complete absence of effort on the part of Correll's counsel to investigate, develop, and present mitigating evidence, including evidence of Correll's psychiatric history and his condition at the time of the murders, constitutes deficient performance 'outside the wide range of professionally, competent assistance.'" *Id.* at 1412. Quoting *Strickland*, 466 U.S. at 690. Additionally, defense counsel met with his client for just five minutes in the month between the jury verdict and the pre-sentencing hearing.

Likewise, in *Hendricks v. Calderon*, 70 F.3d 1032 (9th Cir. 1995) counsel failed to conduct any investigation into mitigating evidence without a strategic rationale to justify the lack of preparation. *See id*, at 1043. In *Clarbourne v. Lewis*, 64 F.3d 1373, 1383 (9th Cir. 1995) counsel "did not call any witnesses, introduce any evidence of Clarbourne's history of mental illness, or argue any mitigating circumstances beside Clarbourne's mental condition at the time of the offense." *Id.* at 1384. Clarbourne's entire mitigation argument took up six pages of the sentencing hearing transcript. The Ninth Circuit held that "the total absence of advocacy [fell] outside *Strickland*'s 'wide range of professionally competent assistance,' and that counsel's representation at the sentencing hearing 'amount[ed] in every respect to no representation at all.' *Id.* 1387. (Citations and internal quotation marks omitted.)"

The instant case stands in stark contrast to the above referenced Ninth Circuit cases. Bean's penalty phase counsel was not derelict relative to these cases. In *Smith*, *Correll*, *Hendricks*, and *Clarbourne* counsel generally

conducted no investigations, presented no mitigating evidence, made no arguments on behalf of their clients and brought virtually no witnesses to the stand. In contrast, Bean's penalty phase counsel offered mitigating evidence to demonstrate Bean's background information and mental deficiencies and thereupon made reasonable arguments on Bean's behalf. Although it would have been preferable for counsel to have presented the plethora of information adduced at the 1996 evidentiary hearing, the United States Constitution does not demand this. Bean's penalty phase counsel was not guilty of a "total absence of advocacy" amounting to no representation at all. *Clarbourne v. Lewis*, 64 F.3d 1373, 1387.

As petitioner has consistently argued, Bean's trial counsel had his investigator contact and interview various family members and friends of Bean in order to develop a penalty phase defense strategy. However, as trial counsel noted at the evidentiary hearing conducted in 1996, Bean and his family simply did not disclose to counsel and his investigator the kind and quantum of information that has been developed in the 17 years this case languished after his state trial. Bean and his family were tacitly and overtly uncooperative and thereby failed to disclose the type of information that would have been helpful in developing a mental health profile. What is most notable about trial counsel's investigator's reports is what the family members and friends did not relate, viz. Bean's alleged chronic use of controlled substances, his head injuries as a child, his mother's habitual ingestion of alcoholic beverages, the regular beatings and tauntings of Bean by his father, and Bean's general inability to cope. Moreover, with the additional neuro-psychological testing that was conducted between the rendition of the guilt verdicts and the commencement of the penalty phase, penalty phase counsel obtained additional information of Bean's background and character.

The issue is not whether federal counsel can find mitigating evidence not discovered by trial counsel, such will always be the case. The issue is whether defense counsel at trial provided constitutionally adequate representation by investigating the possible mitigating evidence reasonably available to him *at that time*. Accordingly, petitioner respectfully submits that Bean does not satisfy the first prong of the real *Strickland* test.

Furthermore, under the second prong of the *Strickland* test, it is unlikely that, had the more detailed evidence now available regarding Bean's background and mental health been presented to the jury, the outcome of the trial would have changed. The jury was exposed to a majority of the evidence the Ninth Circuit now points to as mitigating factors. Without question, several graphic details of Bean's childhood were not shared with the jury. The jury was aware, however, that Bean spent time in juvenile detention, was beaten by his parents, and left home at 15. Similarly, while a jury did not hear all the possible evidence of Bean's mental deficiencies, the jury was exposed to two psychiatric experts testifying as to Bean's brain damage. The additional details discussed by the Ninth Circuit do not sufficiently change the overall picture of Bean's condition and history such that there is a reasonable probability that the outcome of the sentencing hearing would be different.

Petitioner submits that the fact that the jury opted not to recommend Bean be sentenced to death for both homicides, refutes the argument that Bean was prejudiced by allegedly substandard performance of defense counsel in the penalty phase. The more reasonable interpretation of these disparate verdicts is that the jury, having heard evidence of the brutality and callousness of the Schatz robbery-burglary-murder determined that the only appropriate punishment for this kind of criminal conduct was death, irrespective of Bean's mental impairments.

III.

GRANTING HABEAS CORPUS RELIEF ON A CLAIM WHICH THE CALIFORNIA SUPREME COURT EXPRESSLY FOUND TO HAVE BEEN PROCEDURALLY BARRED AND UNTIMELY OFFENDS THE MOST BASIC PRINCIPLES OF COMITY AND FEDERALISM

The claim upon which the District Court ultimately granted relief had been expressly found to be both procedurally barred and untimely presented by the California Supreme Court.

The final question presented in this case is extremely important since the Federal court's refusal to recognize the California Supreme Court's express application of its timeliness procedural bar to Bean's claims is a direct affront to the dignity of the fragile relationship between federal and state governments. This structural injustice offends the most basic principles of comity and federalism. This ruling has already had profound and unjust consequences on the recognition of California's procedural rules. California's procedural rules are entitled to both respect and cannot be brushed aside lightly by either the Ninth Circuit or District Court.

A manifest injustice has now resulted from the Ninth Circuit's refusal to honor California's express procedural bar finding as to claim XLIX of the state habeas petition since relief has been granted as to this claim. A defendant who was lawfully sentenced to death and who violated California's procedural rules by failing to file a timely habeas corpus petition has been rewarded by the federal courts with habeas corpus relief.

As a result of the District Court and Ninth Circuit's decisions, the State was forced to litigate numerous untimely claims in federal court, many of which

contain a number of subissues, which were properly procedurally barred by the state court. In addition, the state was forced to litigate claims in this case which were also procedurally defaulted under state law since they could have been, but unjustifiably were not, raised on appeal. Accordingly, the state's authority to mandate that state prisoners comply with its valid procedural requirements has not only been unjustifiably compromised, but now, relief has been granted on a claim which was not properly before the federal court because it had not been timely presented to the state court. This unnecessary litigation and the erroneous granting of relief are contrary to the weighty state interest in the finality of its judgment and enforcement of its laws. Unless this Court now boldly steps forward to recognize the validity of California's rules of procedural bar prior to *Clark*, the numerous California capital cases in federal court will all be subject to this unnecessarily protracted litigation and relief may again be granted on claims which can not properly be presented to a federal court.

Pursuant to the compelling mandates of comity and federalism, federal courts generally will not review the merits of a claim in a petition for writ of habeas corpus if the state courts denied the claim on state procedural grounds that are both independent of federal law and adequate to support the judgment. *Coleman v. Thompson*, 501 U.S. 722, 731-732 (1991). The standard has been stated as follows:

> A procedural default is not "independent" if, for example, the state procedural bar depends upon an antecedent determination of federal law. Similarly, the procedural default is not "adequate" if the state courts themselves bypass the petitioner's default and consider his claims on the merits, if the procedural rule appears to be discretionary, or, ordinarily, if the state fails

> to assert an interest in compliance with its procedural rules in the petitioner's federal habeas proceedings.

Harmon v. Ryan, 959 F.2d 1457, 1461 (9th Cir. 1992).

Courts have also observed that "[n]ovel procedural requirements or those of whose existence the defendant could not reasonably be deemed to have been apprised, cannot be permitted to thwart review. . . ." *NAACP v. Alabama, ex rel. Flowers*, 377 U.S. 288, 297 (1964). Similarly, another federal court observed that "[a] state ground is adequate only if the state court acts in a consistent and principled way. A basis of decision applied infrequently, unexpectedly, or improperly may be inadequate, for the lack of notice and consistency may show that the state is discriminating against the federal rights asserted." *Prihoda v. McCaughtry*, 910 F.2d 1379, 1383 (7th Cir. 1990), citing *Johnson v. Mississippi*, 486 U.S. 578, 587-589 (1988). Indeed, this very Court has also held that, before a state procedural rule can be considered adequate and independent to bar federal court consideration, the rule "must have been 'firmly established and regularly followed' by the time as of which it is to be applied." *Ford v. Georgia*, 498 U.S. 411, 424 (1991). Neither the Ninth Circuit nor the District Court may callously disregard California's well-established procedural bars. Since California's procedural bars have never been shown to have been applied infrequently, unexpectedly, or improperly, it was clear constitutional error to grant relief on a claim which the California Supreme Court rejected as untimely.

A. California's Well Established And Consistently Applied Timeliness Requirements Were Applicable To Petitions For Writ Of Habeas Corpus In Capital Cases Filed Prior To 1994

California courts have consistently held that a state habeas petitioner must assert all claims known to him in a timely manner and that a petitioner must fully explain and justify any substantial delay in asserting known claims. *In re Clark*; *In re Stankewitz*, 40 Cal.3d 391, 396, n. 1; *In re Walker*, 10 Cal.3d 764, 774 (1974).

In June of 1989, the California Supreme Court published a detailed set of guidelines pertaining to the timeliness requirements applicable to state habeas petitioners in capital cases, entitled "Supreme Court Policies Regarding Cases Arising From Judgments of Death," (hereinafter "the Policies"). Attached hereto as Appendix E.

These standards which by then had been in effect for five years were in place on June 1, 1994, at the time Bean filed his first and only state petition for writ of habeas corpus. Counsel also knew that these standards applied in 1989 to Bean's application for collateral review, and in 1994, counsel sought to explain the 13 year delay in the filing of these clearly untimely claims when the state habeas petition was filed. The language of these standards clearly indicate their applicability to Bean's case while it was still active in the state courts.

Both the District Court and the Ninth Circuit's denial of the State's request for an extraordinary writ have taken the position that Bean's procedural default must be examined at the time it occurred. Fair enough. However, according to the Ninth Circuit, the default occurred at some nebulous time prior to the California Supreme Court's 1993 decisions in *Clark* and *Harris* when Bean consciously gambled that under California law he could file a grossly out of time petition without penalty. This

was never the law in California and in actuality, Bean defaulted all of his claims when he waited until June 1, 1994, to file an untimely petition without adequate justification for the delay.

B. It Is Clear Constitutional Error To Assume That California's Timeliness Procedural Requirements Were Not Independent And Adequate State Procedural Bars To Federal Review

In the instant case, Claim XLIX of Bean's 1994 Petition for Writ of Habeas Corpus was rejected by the California Supreme Court on the procedural grounds of being untimely. Thus far, both the District Court and the Ninth Circuit have concluded that the procedural bars relied upon by the California Supreme Court were not "adequate" to preclude federal review, especially in light of the California Supreme Court's decision in *In re Clark* at 750. It has been reasoned that, prior to *Clark*, California courts had not consistently applied *any* procedural bar in a consistent way, citing *Siripongs v. Calderon*, 35 F.3d 1308 (9th Cir. 1994), cert. denied, 115 S.Ct. 1175 (1995) and *Karis v. Vasquez*, 828 F.Supp. 1449 (E.D.Cal. 1993), and that to apply the timeliness bar to Bean in the instant case would be an unfair retroactive application of the allegedly stricter timeliness standards articulated in *Clark*.

The crux of this error is that the court's which have thus far considered this question have blurred the distinction between the California Supreme Court's analysis in *Clark* with respect to the successive petitions procedural bar and that of the timeliness procedural bar. It was recognized in *Paradis v. Arave*, 954 F.2d 1483 (9th Cir. 1992) that, in evaluating the adequacy of state procedural bars, federal courts must focus on the

particular procedural bar invoked in the case at hand. The fact that one particular state procedural bar may be subject to attack on the ground it has been inconsistently or irregularly applied does not justify the inference that a different state procedural bar has been inconsistently or irregularly applied. *Id.* at 1493; see *Moran v. McDaniel*, 80 F.3d 1261, (9th Cir. 1996) [upholding Nevada's untimeliness procedural bar while distinguishing *McKenna v. McDaniel*, 65 F.3d 1483 (9th Cir. 1995), which found another Nevada bar based on a failure to object at trial inadequate to forestall federal review]. Disregarding *Paradis*, both the Ninth Circuit and the District Court in the instant case inferred from the admission in the *Clark* opinion that previously the successive petitions procedural bar had not been regularly and consistently applied in California that this same inconsistency applied equally to California's application of the timeliness procedural bar. Such an inference is erroneous as the histories of the two procedural bars, successive petitions and timeliness, are quite different. More importantly, nothing in *Clark* suggests that the California courts have not regularly or consistently applied the timeliness procedural bar, nor has it ever been *proven* otherwise.[3]

Any determination of the adequacy of California procedural bars requires an honest examination of the *Clark* decision in which the California Supreme Court thoroughly analyzed the applicability of several state procedural bars to petitions for writ of habeas corpus. The California Supreme Court examined, separately, both the successive petitions bar and the timeliness bar. *In re Clark* at 767-782.

The federal courts have eagerly adopted and used to support their view that the decision in *Clark*

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3. See *Morales v. Calderon*, 85 F.3d 1387 (9th Cir. 1996) and *Fields v. Calderon*, 125 F.3d 757 (9th Cir. 1997).

signalled a drastic change in California's timeliness standards. *Id.* at 768.

However, such reliance ignores the fact that this language is found in the section of the state court opinion entitled "Repetitious and piecemeal claims" (*In re Clark* at 767). Thus far, a deaf ear has been turned to the California Supreme Court's assertions under the separate section entitled "Delay." Where the California Supreme Court observed, "Our decisions have *consistently required* that a petitioner explain and justify any substantial delay in presenting a claim. [Citation omitted; emphasis added.]" *In re Clark* at 783. If the California Supreme Court's admission of inconsistent application of the bar against successive petitions prior to *Clark* is to be readily accepted without question or analysis, the California Supreme Court's express assertion of a consistent requirement that substantially delayed claims have had to be justified must be given equal force. The District Court must presume that the California Supreme Court "has carried out its [state law] obligations even when it does not expressly indicate in its opinion that it has done so." *Beam v. Paskett*, 3 F.3d 1301, 1306 (9th Cir. 1993).

In rejecting the petitioner's argument in *Clark* that the Policies should not apply to him, the California Supreme Court observed, contrary to the District Court here, that:

> Even before June 1989, a habeas corpus petitioner who had knowledge that grounds for a habeas corpus petition existed *was on notice* that any substantial delay in filing a petition after the grounds became known had to be justified. *In re Stankewitz* at 396, fn. 1.

Emphasis added; *id.* at 782.

Moreover, California's highest court did not suggest that its 1989 Policies, or its decision in *Clark*, altered that court's longstanding approach to its timeliness bar. The

Policies merely set forth a presumption of timeliness and referred directly to *Stankewitz*, as the appropriate well defined standard for assessing timeliness. *In re Clark* at 783. Consequently, the court rejected an argument that the Policies changed any preexisting timeliness requirements. *Id.* at 785.

Thus, contrary to the Ninth Circuit and District Court opinions, the California Supreme Court's holding in *Clark* did *not* indicate that its prior holdings with respect to the timeliness bar were inconsistently applied. And, importantly in the instant case, the California courts have always required that a state habeas petitioner justify any substantial delay in filing a habeas petition. Bean knew this since he made an extensive but unsuccessful attempt in his habeas petition to justify the delay in presenting his new claims. The California Supreme Court made a specific finding that he failed as to all 52 of these claims.

This case is unlike that of *Ford v. Georgia* at 411. In *Ford*, the Georgia Supreme Court changed the specific period in which a criminal defendant could challenge his jury selection/composition and preserve the issue for review to a time past that in which that petitioner could have complied. *Id.* at 422.

Unlike the defendant in *Ford*, Bean was not absolutely deprived of his day in court in that he was given the opportunity to justify the substantial delay in presenting his unexhausted issues to the state high court. Nor was the requirement of justification, whatever its form, a novel or unexpected rule applied without notice at a time when Bean could not comply. *See, e.g., Fearance v. Scott*, 56 F.3d 633, 642 (5th Cir. 1995) [no problem of retroactivity noted where state court dismissed petitioner's third state petition, which, in that subsequent petition, cited no "cause" for raising claim that existed at time of first writ, even though the state court had not in the past regularly and strictly applied its abuse of the writ rules]; *Pearson v. Norris*, 52 F.3d 740 (8th Cir. 1995); also

Tredway v. Farley, 35 F.3d 288, 292-295 (7th Cir. 1994). Without a showing by Bean of adequate justification, the California Supreme Court followed its well established rule that such petitions be summarily denied. *In re Clark* at 797. Because California's timeliness requirements for capital habeas petitions were well-established and consistently applied in 1994 at the time Bean unsuccessfully attempted to make such a showing, a mortal and wholly unnecessary blow has been struck to the basic precepts of comity and federalism. Here, California's timeliness procedural bar has been erroneously held not to be an adequate state rule to foreclose federal review of the 52 issues belatedly raised by Bean in his state habeas petition and relief has now been granted on one of these defaulted claims, allowing Bean to escape the death penalty.

CONCLUSION

Accordingly, for the foregoing reasons, petitioner respectfully prays that a writ of certiorari issue to the United States Court of Appeals for the Ninth Circuit in the case at bar.

Dated: May 27, 1999.

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